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Sellers v. Sellers : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOANN SELLERS, Petitioner/Appellant, vs. GLEN RAY SELLERS, Respondent/Appellee.	Appellate Case No. 2009518-CA

ADDENDUM TO BRIEF OF APPELLANT

Appeal from the Amended Findings of Fact and Conclusions of Law and Amended Decree of Divorce of the Third District Court, Judge Robert Faust, signed and entered on March 23, 2009.

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STATEMENT OF JURISDICTION

The Court has jurisdiction pursuant to Rule 3(a) Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES

ISSUE 1: Did the trial court commit error by entering custody orders without the court conducting a best interest examination as is mandated in Utah Code §30-3-10 through 30-3-10.2 and based upon the recommendation of the custody evaluator who did not comply with the Rules of Judicial Administration, Rule 4-903(5)?

ISSUE PRESERVED AT TRIAL: The issue of the trial court committing error by not conducting a best interest test to determine custody or having the custody evaluator enter a recommendation without fully complying with Rule 4-903 of the Rules of Judicial Administration was preserved at trial by the trial court's admission that the court must examine certain factors to determine custody (R@ 682, page 20 and 35).

STANDARD OF REVIEW: In custody matters, appellate courts generally give the trial court considerable discretion, see Carsten v. Carsten, 2007 UT App 174,¶ 3, 164 P.3d 429, because the trial court's proximity to the evidence places it in a better

position than an appellate court to choose the best custody arrangement. See Shioji v. Shioji, 712 P.2d 197, 201 (Utah 1985). That broad discretion, however, must be guided by the governing law adopted by the Utah Legislature, see Utah Code Ann. §30-3-10, -10.2. The Court reviews questions of statutory interpretation for correctness. See Wells v. Wells, 871 P.2d 1036, 1038 (Utah Ct. App. 1994).

ISSUE 2: Did the trial court commit error by entering findings and ordering the parties to exercise joint legal custody of the parties' minor child without the parties submitting a parenting plan and without the Court determining that joint legal custody was in the best interest of the minor child?

ISSUE PRESERVED AT TRIAL: The issue of the trial court committing error by not entering a parenting plan with its order that the parties exercise joint legal custody, was preserved at trial with the trial court's acceptance of the custody evaluator recommendation (R@ 682, page 36 and 37) and Petitioner's concerns and rejection of such.

STANDARDS OF REVIEW: In custody matters, appellate courts generally give the trial court considerable discretion, see Carson v. Carson, 2007 UT App 174, P3, 164 P.3d 429, because the trial courts proximity to the evidence places it in a better position than an appellate court to choose the best custody arrangement. See Shioji v. Shioji, 712 P.2d 197, 201 (Utah 1985). That broad discretion must be guided by the governing law adopted by the Utah legislature, see Utah Code Ann.

§30-3-10.2. The appellate court reviews questions of statutory interpretation for correctness, see Wells v. Wells, 841 P.2d 1036, 1038 (Utah Ct. App. 1994).

ISSUE 3: Did the trial court commit error by entering amended findings and an amended decree that were inconsistent and created confusion regarding parent time of the minor child's overnights with each parent? Does this issue intertwine with the problem of there being no joint legal custody parenting plan submitted by the parties or demanded by the court?

ISSUE PRESERVED AT TRIAL: The issue of the trial court committing error by entering conflicting orders of parent time was preserved at trial when the court dealt with the recommendation of the custody evaluator and Petitioner rejected the recommendation (R@ 682, page 36 and 37).

STANDARD OF REVIEW: In custody matters, appellate courts generally give the trial court considerable discretion, see Carson v. Carson, 2007 UT App 174, P3, 164 P.3d 429, because the trial courts proximity to the evidence places it in a better position than an appellate court to choose the best custody arrangement. See Shioji v. Shioji, 712 P.2d 197, 201 (Utah 1985). While the trial court's findings of fact in divorce appeals are reviewed under the "clearly erroneous standard", its conclusions of law "are reviewed for correctness and given no special deference on appeal". Howell v. Howell, 806 P.2d 1209, 1211, (Utah Ct. App. 1991).

ISSUE 4: Did the trial court commit error in its determination that neither party was awarded alimony from the other, either now or in the future?

ISSUED PRESERVED AT TRIAL: The issue of the trial court forever barring alimony either now or in the future was preserved at trial when the trial court took the alimony issue under advisement and entered a ruling five days after trial (R@ 440-441) and Petitioner later filed her Motion for Reconsideration regarding the alimony ruling (R@ 480-501).

STANDARD OF REVIEW: While the trial court's findings of fact in divorce appeals are reviewed under the "clearly erroneous standard", its conclusions of law "are reviewed for correctness and given no special deference on appeal". Howell v. Howell, 806 P.2d 1209, 1211, (Utah Ct. App. 1991).

ISSUE 5: Did the trial court commit error in its determinations that JoAnn was to receive no alimony from Glen because she had no need and because Glen's ability to pay had not been calculated?

ISSUES PRESERVED AT TRIAL: The issue of the trial court not ordering that Respondent pay any alimony to Petitioner because Petitioner had no need for alimony was preserved at trial when the trial court took the alimony issue under advisement and entered a ruling after trial (R@ 440-441) and Petitioner later filed her Motion for Reconsideration (R@ 490-501).

STANDARD OF REVIEW: While the trial court's findings of fact in divorce appeals are reviewed under the "clearly erroneous standard", its conclusions of law "are reviewed for correctness and given no special deference on appeal". Howell v. Howell, 806 P.2d 1209, 1211, (Utah Ct. App. 1991).

ISSUE 6: Did the trial court commit error by declining to take into account in its alimony determination JoAnn's request to have Glen pay post-divorce savings and/or retirement monies to her?

ISSUES PRESERVED AT TRIAL: The issue of the trial court not considering Petitioner's claim to include retirement needs as part of her claim for alimony was preserved at trial when the trial court took the alimony issue under advisement and entered a ruling after trial (R@ 440-441) and Petitioner later filed her Motion for Reconsideration (R@ 490-501).

STANDARD OF REVIEW: Trial courts have considerable discretion in determining alimony and property distribution in divorce cases, and will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated. Howell v. Howell, 806 P.2d 1209, 211 (Utah Ct. App. 1991). In exercising its discretion, however, the trial court must make explicit findings of fact in support of its legal conclusions. Montoya v. Montoya, 696 P.2d 1193, 1194 (Utah 1985).

DETERMINATIVE STATUTES AND RULES

UTAH CODE ANN. 30-3-5(8)(a-e)

(8) (a) The court shall consider at least the following factors in determining alimony:

(i) the financial condition and needs of the recipient spouse;

(ii) the recipient's earning capacity or ability to produce income;

(iii) the ability of the payor spouse to provide support;

(iv) the length of the marriage;

(v) whether the recipient spouse has custody of minor children requiring support;

(vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and

(vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

(b) The court may consider the fault of the parties in determining alimony.

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (8)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

(d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(e) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced

through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

UTAH CODE ANN. 30-3-10(1)(a)(i-iv)

(1) If a husband and wife having minor children are separated, or their marriage is declared void or dissolved, the court shall make an order for the future care and custody of the minor children as it considers appropriate.

(a) In determining any form of custody, the court shall consider the best interests of the child and, among other factors the court finds relevant, the following:

(i) the past conduct and demonstrated moral standards of each of the parties;

(ii) which parent is most likely to act in the best interest of the child, including allowing the child frequent and continuing contact with the noncustodial parent;

(iii) the extent of bonding between the parent and child, meaning the depth, quality, and nature of the relationship between a parent and child; and

(iv) those factors outlined in Section 30-3-10.2.

UTAH CODE ANN. 30-3-10.2(1)-(2)

(1) The court may order joint legal custody or joint physical custody or both if one or both parents have filed a parenting plan in accordance with Section 30-3-10.8 and it determines that joint legal custody or joint physical custody or both is in the best interest of the child.

(2) In determining whether the best interest of a child will be served by ordering joint legal or physical custody, the court shall consider the following factors:

(a) whether the physical, psychological, and emotional needs and development of the child will benefit from joint legal or physical custody;

(b) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;

(c) whether each parent is capable of encouraging and accepting a positive relationship between the child and the other parent, including the sharing of love, affection, and contact between the child and the other parent;

(d) whether both parents participated in raising the child before the divorce;

(e) the geographical proximity of the homes of the parents;

(f) the preference of the child if the child is of sufficient age and capacity to reason so as to form an intelligent preference as to joint legal or physical custody;

(g) the maturity of the parents and their willingness and ability to protect the child from conflict that may arise between the parents;

(h) the past and present ability of the parents to cooperate with each other and make decisions jointly;

(i) any history of, or potential for, child abuse, spouse abuse, or kidnapping; and

(j) any other factors the court finds relevant.

RULES OF JUDICIAL ADMINISTRATION: 4-903(5)

(5) The purpose of the custody evaluation will be to provide the court with information it can use to make decisions regarding custody and parenting time arrangements that are in the child’s best interest. This is accomplished by assessing

the prospective custodians' capacity to parent, the developmental, emotional, and physical needs of the child, and the fit between each prospective custodian and child. Unless otherwise specified in the order, evaluators must consider and respond to each of the following factors:

(5)(A) the child's preference;

(5)(B) the benefit of keeping siblings together;

(5)(C) the relative strength of the child's bond with one or both of the prospective custodians;

(5)(D) the general interest in continuing previously determined custody arrangements where the child is happy and well adjusted;

(5)(E) factors relating to the prospective custodians' character or status or their capacity or willingness to function as parents, including:

(5)(E)(i) moral character and emotional stability;

(5)(E)(ii) duration and depth of desire for custody;

(5)(E)(iii) ability to provide personal rather than surrogate care;

(5)(E)(iv) significant impairment of ability to function as a parent through drug abuse, excessive drinking or other causes;

(5)(E)(v) reasons for having relinquished custody in the past;

(5)(E)(vi) religious compatibility with the child;

(5)(E)(vii) kinship, including in extraordinary circumstances stepparent status;

(5)(E)(viii) financial condition; and

(5)(E)(ix) evidence of abuse of the subject child, another child, or spouse; and

(5)(F) any other factors deemed important by the evaluator, the parties, or the court.

STATEMENT OF THE CASE

Petitioner, JoAnn Sellers, hereinafter "JoAnn", separated and filed for divorce against Respondent, Glen Sellers, hereinafter "Glen", on or about April 9, 2005. JoAnn and Glen were married on March 20, 1981. They had been married for twenty-four (24) years at the time of the divorce filing. There were three (3) children born as issue of the marriage, one of whom was a minor of fourteen (14) years of age when the matter came on for trial on February 20, 2008.

At the time of separation, JoAnn was employed by Granite School District and had gross monthly income of $1,824. At the time of trial the Court found that JoAnn's W-2 for 2007 indicated that her gross monthly income was $4,031.82. At the time of trial the Court found Glen's gross monthly income to be $7,920.33 or $95,044 annualized based on his 2007 W-2 tax documents.

After trial, the Court scheduled an Objection hearing to be held on June 2, 2008 to discuss the Findings as prepared by Glen's counsel and the Objections as raised by JoAnn's counsel. At the time of the objection hearing JoAnn and her attorney were unaware that the trial court had already entered a Decree of Divorce and that Glen was already making financial decisions and had no motivation to work on outstanding issues.

At the Objection hearing, Glen's counsel committed to prepare new findings and a new decree based upon the ruling of the court at the Objection hearing. After waiting six months for Glen's counsel to comply, JoAnn's counsel prepared finding and a decree (still unaware that the Decree had been signed seven months earlier) to which Glen's counsel objected. The Court entered the Finding and Decree prepared by JoAnn's counsel and the court labeled the documents as Amended Finding and Amended Decree.

The Court ordered, among other things, the following:

1) Neither party was awarded alimony from the other, either now or in the future;

2) The parties were to exercise joint physical and joint legal custody;

3) JoAnn was awarded two hundred and forty-three (243) overnights per year with the minor child and Glen was awarded one hundred and twenty-two (122) overnights per year;

4) The parties were ordered by the court to follow Utah Code Section 30-3-35 regarding additional times that Glen should have parent-time with the minor child;

5) The court ordered that Glen could have additional parent-time if the parties agreed;

6) JoAnn's needs in relation to her claim for alimony were calculated using her expenses of several years earlier and the court did not consider her needs for retirement income;

7) The court did not assess Glen's specific needs relating to the claim that he pay alimony nor did the court address the standard of living of the parties.

STATEMENT OF FACTS

At the time of trial the parties had been separated for a little less than three years. The parties marital relationship at the time of trial was going on twenty-seven years (R@ 2). At the time of the filing of the divorce JoAnn had raised concerns regarding Glen's ability to parent and JoAnn had requested that only supervised parent time be allowed (R@ 2).

A custody evaluator was appointed by the court to assist the parties in determining the best interest of the minor child. Since this was a high conflict matter, the evaluator, Dr. Valerie Hale, appeared at trial and gave testimony as to her recommendation relating to custody (R@682 Page 21). There was no written recommendation prepared by Dr. Hale and the court recognized at trial that there were statutory requirements that the court was under relating to its decision and determination regarding custody (R@682 page 35).

The court adopted the recommendation of Dr. Hale and ordered a joint physical and legal custody parenting arrangement. No parenting plan was submitted

by either party. The court also made numerous other orders relating to "additional time" that Glen was awarded with the minor child (R@560).

The parties' incomes at the time of trial were very disproportionate with Glen's earnings being considerably greater than the income of JoAnn (R@ 549).

Throughout the proceeding, JoAnn requested that she be awarded alimony from Glen based on her need for alimony and that the parties' standard of living dictated that alimony be awarded. The trial court determined that JoAnn did not have a need for alimony and that JoAnn's request that post-divorce savings investment or retirement monies be calculated in her needs for alimony was not to be considered (R@ 440).

Further, the court ordered that in the future, neither party could be awarded alimony. The court ordered both parties to be fully liable and responsible for their own attorney fees and costs.

SUMMARY OF ARGUMENT

The District Court erred in its determination that the parties were to exercise joint physical and legal custody, and Glen was to receive "additional" overnights with the minor child that were not specifically set but could range between an additional thirty (30) to fifty (50) overnighters per year. No parenting plan had been submitted by the parties and the court was aware of JoAnn contesting the recommendation of the custody evaluator.

Both the court and the evaluator failed to specifically set forth sufficient findings for custody per the mandates of the statute or rules and no best interest determination was even mentioned or determined by the trial court.

The district court further erred in its determination regarding alimony and the needs of both parties relating to the alimony claim which were not correctly addressed. The court's assertion that both parties were barred from alimony in the future was plain error.

ARGUMENTS

POINT 1

DID THE TRIAL COURT COMMIT ERROR BY ENTERING CUSTODY ORDERS WITHOUT THE COURT CONDUCTING A BEST INTEREST EXAMINATION AS IS MANDATED IN UTAH CODE §30-3-10 THROUGH 30-3-10.2 AND BASED UPON THE RECOMMENDATION OF THE CUSTODY EVALUATOR WHO DID NOT COMPLY WITH THE RULES OF JUDICIAL ADMINISTRATION, RULE 4-903(5)?

In making a determination as to the future custody of a minor child, the trial court is under obligation to take into account certain statutory considerations as are specifically set forth in Utah Code §30-3-10 through §30-3-10.2. These factors include and are part of the "best interests of the child test" which must be analyzed by the trial court.

In reviewing the amended finding of fact and conclusions of law and amended decree of divorce entered by the trial court on March 23, 2009 there is no mention or findings entered of the specific criteria set forth in the statutes previously cited, nor is

there any mention of the court analyzing what is in the best interest of the minor child (R@ pages 647-663).

It can be argued that the trial court relied on the custody evaluator's recommendation that the parties implement a joint physical and joint legal custody parenting arrangement with JoAnn having twenty (20) overnighters per month and Glen exercising ten (10) overnighters per month with the parties' minor child. The problem with that argument is that the evaluator did not submit a written report to the trial court, nor did the evaluator testify regarding each of the elements that are required in the statute already cited nor did the evaluator testify concerning the specific criteria as is mandated in the Rules of Judicial Administration, Rule 4-903(5). Custody evaluators are under stringent rules that they must identify and explore every one of the criteria that is expressly set for in Rule 4-903(5).

JoAnn, through her counsel, specifically put the trial court on notice that she did not agree with the recommendation of the court appointed custody evaluator, Dr. Valerie Hale (R@ 682, page 104). Dr. Hale testified at trial and specifically recommended to the court that the parties should exercise the custody arrangement previously identified.

It can be argued that Dr. Hale included in her oral testimony all of the necessary factors that the trial court needed to consider to make a custody determination. Yet, a page by page review of her testimony (R@ 682, pages 36,

and 52-55) reveals that not all of the mandated criteria were taken into consideration and testified to.

This is proof positive that not all required factors were considered by the evaluator and the argument is then made that since the trial court adopted the recommendation of the evaluator lock, stock, and barrel, the trial court failed to enter the necessary findings to make a proper custody decision.

Even if it is determined that the statutory requirements were met to determine custody, there is no indication made whatsoever that the trial court made specific findings or stated what was in the best interest of the parties' minor child. Without the court having made the necessary findings by going through the criteria as is mandated by the statute, and there being no findings set forth regarding best interests, the entry by the Court of an order of custody must fail and be reversed.

POINT 2

DID THE TRIAL COURT COMMIT ERROR BY ENTERING FINDINGS AND ORDERING THE PARTIES TO EXERCISE JOINT LEGAL CUSTODY OF THE PARTIES' MINOR CHILD WITHOUT THE PARTIES SUBMITTING A PARENTING PLAN AND WITHOUT THE COURT DETERMINING THAT JOINT LEGAL CUSTODY WAS IN THE BEST INTEREST OF THE MINOR CHILD?

In order for joint legal custody to be ordered by the trial court, several statutory provisions of the Utah Code must be complied with. These statutory directives are two- fold. First, the trial court must have received a parenting plan from one or both of the parties. Second, the trial court must have specifically made a determination that joint legal custody was in the best interest of the minor child (See Utah Code

§30-3-10 through 10.2). Further, the Utah Court of Appeals has stated that this section of the code requires that a parenting plan be submitted before a court may order joint custody (Trubetzkoy v. Trubetzkoy, 2009 UT App 77, 205 P.3d 891).

The trial court did commit reversible error by entering specific amended findings of fact (R@ page 648) and an amended decree of divorce (R@ page 659) stating that each of the parties were fit and proper parents to be awarded joint legal custody. The amended decree ordered joint legal custody without a parenting plan being provided by either party and the court did not make an inquiry or finding or a determination as to whether joint legal custody was in the best interest of the parties' minor child.

It may be argued that the trial court relied upon the court appointed custody evaluator who did not prepare a report and who testified at trial that her opinion was that the parties exercise joint legal custody and recommended a specific time sharing split. This parent time recommendation however, should not be construed as a parenting plan and the file or record does not indicate that a parenting plan was offered by either party. Additionally, it should not be construed that there was compliance with a parenting plan mandate just because the trial court did put a mechanism in place for the parties to deal with situations where they did not agree on parenting decisions for the minor child and the child's therapist was to be involved in the decision making process.

Regardless, the trial court must conduct an inquiry as to what is in the best interest of the minor child in relation to a joint legal custody determination and the trial court must enter a specific finding to support its order of joint legal custody if the order is to comply with the statute. Further, even though the court identified the minimum parent time statute (Utah Code §30-3-35) in its amended decree, that should not be construed as a parenting plan.

The trial court did not enter a parenting plan nor did the court identify that it had conducted a best interest of the child inquiry which is why the order must be reversed and why JoAnn should be awarded sole legal custody since the trial court already recognized her as the primary physical custodial parent. Prior to there being a requirement that a joint legal custody order must be accompanied with a parenting plan, the court of appeals had previously recognized that joint legal custody was not appropriate in situations where the parents were not in agreement (Thronson v. Thronson, 810 P.2d 428).

POINT 3

DID THE TRIAL COURT COMMIT ERROR BY ENTERING AMENDED FINDINGS AND AN AMENDED DECREE THAT WERE INCONSISTENT AND CREATED CONFUSION REGARDING PARENT TIME OF THE MINOR CHILD'S OVERNIGHTS WITH EACH PARENT? DOES THIS ISSUE INTERTWINE WITH THE PROBLEM OF THERE BEING NO JOINT LEGAL CUSTODY PARENTING PLAN SUBMITTED BY THE PARTIES OR DEMANDED BY THE COURT?

The amended findings of fact and conclusions of law state that there is to be parent time for each of the parties employing a 20/10 overnight split each month as

was recommended by the custody evaluator. Twenty (20) days each month JoAnn is to have parent time and ten (10) days each month Glen is to have parent time (R@ page 611).

In its amended findings the trial court gave specific directions to the parties by breaking the parent time into four (4) separate divisions (A through D) which gave both parties directives on how the parent time was to be accomplished (R@ page 611 and 612). A close examination of the amended findings and directives of the court reveal that the findings are inconsistent and they create confusion and they cannot be implemented as ordered, especially in light of the court's amended finding at paragraph 7.

Subsection 5A, if implemented, would equate to 240 overnighters of the minor child with JoAnn and 120 overnighters of the minor child with Glen. Paragraph 7 of the amended findings and paragraph 4 of the amended decree state that the division of overnighters was to be a 243/122 overnight split between the parties.

If literally applied, paragraph 5B would mandate that Glen have 52 overnighters each year and Paragraph 5C would give Glen an additional 78 overnighters each year. It is important to note that these overnighters do not seem to be tied to the times that the minor child is in school. School is referenced only as a guide. In other words, one would think that the overnighters should be viewed in the context of the full year and not just during the school year.

Therefore, paragraphs 5B and 5C would total 133 overnighters each year for Glen, which is different than the 240/120 split recommended by the evaluator and adopted by the trial court and the 243/122 split specifically ordered by the trial court at paragraph 7.

However, the parent time division problem is further compounded by the court's amended finding in paragraph 5D which awards additional time consistent with Utah Code §30-3-35. It can be interpreted that the trial court meant to apply Section 30-3-35 to distinguish additional specific holiday parent time to be added to the court ordered overnight split. However, the trial court was silent on what it specifically meant regarding "additional parent time" and with the inconsistencies as set forth in the paragraphs A-D, one is really left to wonder what the trial court intended.

Was the intent for the parties to apply the 20/10 overnight split as an overlay into the minimum guideline statute? The trial court did explain that the statute was to be used for "additional parent time". Hence, the trial court did enter conflicting findings by ordering the parties to employ the 20/10 overnight split, then told the parties that that equals a 243/122 overnight division and subsequently the parties were to implement 5B and 5C which would be equal to a 232/133 overnight split with additional parent time being possible by using the statute. This problem is further compounded since there was no parenting plan submitted by either party and

the court entered a joint legal custody order while at the same time rendering conflicting orders on parent time overnighters.

Instead of receiving orders of clarity and specific directives from the trial court, the parties came away from trial with numerous conflicting orders. If it is argued that the difference in the number of the overnighters is insignificant, that this is harmless error, the implementation of "additional time" under Section 30-3-35 could result in an additional 30-50 overnight time period discrepancy. In fact, if it is believed that this 30-50 additional overnighter discrepancy is farfetched, it must be noted that the trial court wrongfully entered its original finding and decree (R@ pages 547 through 564) which initially ordered 160 overnights with Glen (R@ pages 549 through 564) and 205 overnights with JoAnn which clearly shows the trial court itself was confused on what it was actually ordering.

A close examination of the initial Findings and Decree signed by Judge Faust on May 21, 2008 were mailed to JoAnn's counsel on May 16, 2008 which was a Friday. JoAnn's counsel would have probably received the documents on Monday, May 19th or Tuesday, May 20th. Glen's counsel did not prepare the documents for JoAnn's counsel to approve as to form. Glen's counsel submitted the final documents to Judge Faust for signature literally one or two days from the time that JoAnn's counsel received the draft. Judge Faust wrongfully signed the documents and divorced the parties. JoAnn and her counsel did not know she was divorced until almost a year later. This gave Glen a huge advantage as he immediately

entered into large financial commitments and bought a new home, while JoAnn was left to think that nothing could be financially wrapped up until the divorce was finalized. Because of this, Glen had no incentive to finalize the case.

This unawareness of finalization is evidenced by JoAnn's counsel preparing an Objection to the draft finding and draft order (R@ page 565 through 574) and submitting them to the Court on May 30, 2008.

Certainly, in this high-conflict custody divorce action the trial court should have attempted to give very specific concrete orders on the time sharing that was to be carried out by the parties. Even though the wrongfully entered Findings and Decree were corrected and Amended Findings and an Amended Decree was later entered (R@ page 648 and 659) this still created huge problems between the parties regarding the number of overnighters the minor child was to spend with each parent. Further, this discrepancy can have a huge impact on the court's order of child support.

It is important to note that JoAnn's position all along has been that she should be awarded sole physical and sole legal custody of the parties' minor child and that Glen should be awarded parent time consistent with the statute just as the parties exercised during their three year separation prior to trial.

POINT 4

DID THE TRIAL COURT COMMIT ERROR IN ITS DETERMINATION THAT NEITHER PARTY WAS AWARDED ALIMONY FROM THE OTHER, EITHER NOW OR IN THE FUTURE?

A literal interpretation of the order entered by the trial court in its amended decree of divorce is that both parties are forever barred from receiving alimony from one another. Specifically, the court stated in its amended decree of divorce at paragraph 20 (R@ page 625) that neither party was awarded alimony from the other, either now or in the future. Are there specific findings that were entered by the trial court to support this conclusion or amended decree that alimony is to be forever barred regardless of future changes in circumstances to either party.

Utah Code section 30-3-5 sets forth Utah law in relation to alimony determinations. There is absolutely no provision in the code giving the trial court direction or latitude to bar future alimony. However, Utah law does specifically set forth how alimony can be modified after a determination has been made by the Court. The modification process, as set forth by statute, informs parties of the substance and process to make a change to an existing Court order. No mention is made of dealing with an adjudicated alimony order that forever bars an individual from attempting a modification.

A comparison can be made by examining the alimony statute in relation to the exact language of when alimony may be curtailed. Specifically, the statute sets forth the several triggering events that can bring an end to an alimony order. One such

triggering event is that alimony can be terminated if the payor has been under an alimony obligation for as long as the Court has determined that the parties were married. An exception to this rule is that an adjudicated alimony award can be ordered longer than the parties marital relationship "only if the Court finds extenuating circumstances and the Court must detail what these extenuating circumstances are."

The analogy can be made that the statute could also have included that for a Court to forever bar alimony to either party, the Court would similarly need to find that extenuating circumstances exist and that the Court would need to specifically identify those extenuating circumstances and enter findings supporting that conclusion.

In this matter, the decision of the Court to forever bar future alimony is really a legal conclusion and Order of the Court, and not a finding. There is absolutely nothing in the record that would lead the trial court to have a factual basis to forever bar alimony. Therefore, this is an abuse of discretion and the trial court's decision to award no alimony to JoAnn and to forever bar a claim should be reversed.

POINT 5

DID THE TRIAL COURT COMMIT ERROR IN ITS DETERMINATIONS THAT JOANN WAS TO RECEIVE NO ALIMONY FROM GLEN BECAUSE SHE HAD NO NEED AND BECAUSE GLEN'S ABILITY TO PAY HAD NOT BEEN CALCULATED?

Many of the findings of the Court's amended findings of fact are really conclusions of law and JoAnn contends that the trial court was deficient in making adequate findings to support its conclusions.

Regarding JoAnn's need for alimony, the trial court's conclusions (even though set forth in the Amended Findings) relied upon JoAnn's affidavit and financial declaration submitted approximately two and a half years prior to trial (R@ pages 103 through 109).

JoAnn's counsel had offered proposed exhibits 29 and 30 that were received by the trial court and admitted into evidence as illustrative of JoAnn's trial testimony regarding her claimed monthly needs supporting her claim for alimony (R@ pages 343 and 345; page 344 was inadvertently submitted between these two pages).

In JoAnn's trial testimony, on direct examination from her attorney, Exhibit 29 was discussed at length (R@ 682, pages 128-146). This exhibit reveals that JoAnn's needs as claimed at trial were $4,488.05 per month. On cross examination, Glen's counsel asked JoAnn some questions about Exhibit 29 (R@ pages 152 through 175). After covering Exhibit 29, Glen's counsel contrasted JoAnn's monthly

expenses she had claimed approximately two and a half years earlier in an affidavit and financial declaration submitted to the Court (R@ 682, page 103 through 109).

Glen's counsel then had Exhibit 47 marked and asked JoAnn questions regarding her old financial declaration (Record @ 682 pages 176 through 189). The record shows on the trial court generated exhibit listing (R@ page 437 and 438) that Glen only offered two exhibits at trial and the transcript reflects that there were two charts used. It appears that the two charts were a comparison with one chart being Exhibit 29 and one chart being Exhibit 47. The transcript also speaks of an Exhibit 48 and an Exhibit 49 (R@ 682 pages 189 and 190), but there are no exhibits in the file showing charts or exhibits 47, 48, or 49. It should be noted that the record does not designate that there were any of the original exhibits tabbed, labeled, and submitted. This shows great irregularities in the handling of the exhibits by the trial court which is compounded by there being no actual exhibit 47, 48, or 49 in the record nor any showing or production of the charts referenced and used by Glen.

Regardless of these irregularities, it appears that the trial court used JoAnn's expenses that were several years old and ignored her current expenses outlined in Exhibit 29 which also included JoAnn's supporting documentation supplied at Exhibit 30.

There was absolutely no financial declaration submitted by Glen at trial and very limited testimony was elicited from Glen by JoAnn's counsel during trial. Again,

the trial court's only finding (conclusion) regarding Glen's income was that "the Court finds that Respondent would have the ability to pay some support" (R@ page 616).

A similar situation existed in the case of Chambers v. Chambers, 840 P.2d 843, wherein the trial court's determination regarding alimony was reversed and remanded when the Court simply stated the "the defendant has the ability to pay."

The threshold issue that the trial court must examine in making an alimony determination is whether the statutory requirements necessary to make a claim for alimony as set forth in Utah Code section 30-3-5(8)(a) have in fact been met.

In the matter of Griffith v. Griffith, 959 P.2d 1015, 344 Utah Adv. 3 p 4, the Utah Court of Appeals articulated that in a parties' claim for alimony that the trial court must enter findings of Defendant's financial needs and that the trial court must make findings of Plaintiff's financial needs. Upon review, the Court of Appeals stated that even though each party testified about their monthly expenses, the trial court did not enter findings about the reasonableness of the expenses. Due to the failure of the trial court to conduct a proper examination, the case was remanded to the trial court. Additionally, the Court of Appeals went on to say that the trial court must enter findings on Plaintiff's (payor) financial needs and ability to pay support.

In the case at hand, there was no financial declaration submitted by Glen so the trial court could not conduct an examination as to his (the payor's) financial needs or if Glen's financial needs were reasonable. The limited testimony that was received from Glen came in the last five minutes of trial as part of JoAnn's counsel's

re-direct examination of Glen (R@ pages 235 through 241). Here again, absolutely no financial declaration was submitted or produced by Glen. The testimony received was limited and vague at best, and there was no assessment by the trial court as to Glen's monthly expense.

The limited findings entered by the trial court are really conclusions wherein the trial court entered at paragraph 30 of its amended findings, "the Court finds that the Respondent would have the ability to pay some support" (R@ page 616). This conclusion has absolutely no findings to support it, and therefore, is an abuse of discretion on the part of the trial court. Further, the court entered no finding as to the reasonableness of this assertion that Respondent would have the ability to pay some support. Interestingly enough, the Utah Supreme Court enumerated in Martinez v. Martinez, 818 P.2d 538, 542 (Utah 1991) that, "where the payor spouse's resources are adequate, alimony need not be limited to provide for only basic needs, but should also consider the recipient spouse's station in life."

The Utah Court of Appeals also sets forth in Breinholt v. Breinholt, 905 P.2d 877 (Utah Ct. App. 1995) that in determining alimony the trial court did not make sufficient findings on the financial needs of each of the parties. The Court stated that such findings are necessary in determining both the standard of living, and, in the case of the payor, the ability to pay. Finally, the Court in Breinholt gave additional direction by stating, "A true finding and determination of the ability to pay requires . . . the trial court to include an analysis of the payor's personal expenses . . ."

Additionally, the Utah Court of Appeals stated in the case of Bakanowski v. Bakanowski, 80 P.3d 153, 2003 UT App 357, "usually the needs of the spouses are assessed in light of the standard of living they had during the marriage. Here, the trial court never determined wife's needs based on the parties historical standard of living."

Further examination reveals that even though the trial court entered specific findings regarding JoAnn's income and expenses and needs (R@ page 615), the reasonableness of expenses and needs was never addressed by the trial court as is required and the Court accepted JoAnn's needs as of several years prior to trial.

In the Utah Court of Appeals case of Compton v. Compton, 888 P.2d 686, 255 Utah Adv. 32 (Utah Ct. App. 1994) the Court stated that, "the needs of the spouses are determined by looking at the standard of living the parties established during the marriage. Living standards, and the needs those standards give rise to, vary from one marital arrangement to another, as do sources of income to meet those needs."

POINT 6

DID THE TRIAL COURT COMMIT ERROR BY DECLINING TO TAKE INTO ACCOUNT IN ITS ALIMONY DETERMINATION JOANN'S REQUEST TO HAVE GLEN PAY POST-DIVORCE SAVINGS AND/OR RETIREMENT MONIES TO HER?

The trial court specifically set forth in its amended findings that, "the Court declines to take into the alimony determination the Petitioner's request to have the

Respondent pay her money for post divorce savings investment or retirement accounts for her" (R@ page 652).

In the case of Kemp v. Kemp, 2001 UT App. 157, the Utah Court of Appeals dealt with this same issue. Since JoAnn's retirement paled in comparison to the retirement of Glen, and even after there was an equal sharing of the retirement proceeds, JoAnn would be in need of additional alimony funds so that she could keep pace with Glen since this was a long term marriage. The Court in Kemp held that although this is not ordinarily factored into an alimony determination, the Court could not say that this should never be taken into account as part of a needs analysis. In fact, the Court stated that if it could be shown that contributing to such accounts was a standard practice during the marriage and helped form the parties' standard of living, the trial court may be within its discretion to make these additional considerations.

JoAnn rendered testimony (R@ 682 pages 117 through 122) that Glen was active in the parties' investment accounts and she also provided exhibits showing what investment accounts the parties held. Exhibits numbered 12 through 23 were submitted and admitted into evidence relating to all of the retirement accounts of the parties. Specifically, Glen's Qwest Pension account document (R@ page 305) showed his start date in 1978 (three years prior to the parties' marriage) and that it had a value of $327,840 (R@ 682 page 140 and R@ page 308).

The specific exhibits were proof positive of the standard practice of the parties' diligence in their investment accounts. This is precisely why JoAnn submitted her accounting and projections that it would take approximately an additional $700 per month (Exhibit 29, R@ page 345) for JoAnn to keep pace with the retirement standard of living that would be afforded to Glen.

Therefore, the trial court erred not only in its determination that no alimony should be awarded, but also in its determination that the parties' post-divorce savings and retirement income should have not been allowed to be calculated as part of Petitioner's need for alimony.

Conclusion

Based upon the foregoing, Petitioner requests that the Amended Finding and Amended Decree previously entered be vacated and reversed.

DATED this _____ day of _____, 2010.

_____
David J Friel
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I caused to be sent by U.S. mail, first class, postage pre-paid, a true and correct copy of the foregoing document on this _____ day of _____, 2010, to:

John Walsh, Esquire
3191 South Valley Street, Suite 240
Salt Lake City, UT 84109

_____

Sellers.appbrief2